Date: October 6, 1995

Case No.: 94-ERA-37

Joseph Roy B. Straub
COMPLAINANT

against

Arizona Public Service Company
Arizona Nuclear Power Project
RESPONDENT

APPEARANCES:
Thomas J. Saporito, Jr.
For Complainant

Richard S. Cohen, Esq.
Thomas J. Kennedy, Esq.
For the Respondent

Before: DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. § 5851 ("AcT" or "ERA"), and the implementing regulations found in 29 C.F.R. Part 24, whereby employees of licensees of or applicants for a license from the Nuclear Regulatory Commission and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The undersigned conducted hearings in Phoenix, Arizona on twenty-three (23) days between September 26, 1994 and January 13, 1995, during which time the parties were given the opportunity to present oral arguments, their witnesses and documentary evidence.[1]

Summary of the Evidence

Joseph Roy B. Straub ("Complainant" herein) submits that he filed his complaint seeking the so-called whistleblower protection of the Energy Reorganization Act ("ERA" or the "Act") because he was fired for having engaged in protected activity (i.e., raising safety concerns) at the Palo Verde Nuclear

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Generating Station owned and operated by Arizona Public Service Company ("Respondent"). Complainant further submits that the misconduct with the van is simply a pretext for terminating him as this episode clearly manifests disparate treatment of him for his protected activity. Complainant also submits that he was an employee at will and cannot be terminated without just cause; moreover, his implied employment contract with the Respondent prevents his discharge by virtue of discriminatory treatment. (CX 281)

On the other hand, the Respondent submits that Complainant must establish a *prima facie* case that he had engaged in protected activity, that the Respondent knew about such activity and that he suffered an adverse personnel action because of his protected activity. Respondent further submits that the evidence is clear-cut and overwhelming that he was terminated because he had knowingly and intentionally violated company rules by having alcoholic beverages in a company vehicle. According to the Respondent, its employees are constantly reminded that they have the right to raise safety concerns, either within the organization or directly to the Nuclear Regulatory Commission ("NRC"). Respondent concedes that Complainant was a good worker but submits that the van episode was the last "straw" in a series of events where his conduct was questioned, e.g., an episode where a co-worker complained to management about Complainant's use of racially-offensive language; another incident involved inappropriate behavior at a hospital training session. Complainant received work assignments just like other radiation technicians. The February 10, 1994 van incident was the catalyst event in the employment relationship between Complainant and Respondent. The van was found in a public school parking lot, parked at an angle to, and not within, the parking spaces; there were empty beer bottles within and outside the van. The local police were called by the school principal and the police, treating it as a serious matter, reported the incident to the Respondent. The latter's Security Department conducted a thorough investigation, including interviews of Complainant and another co-worker who was also involved, and both admitted violating company rules in connection with the use of the van. Michael Shea made the decision to terminate Claimant and the decision was based solely on that misconduct with the van. Respondent also points out that Complainant was denied unemployment benefits because of such misconduct. In summary, Respondent, positing that there has been no disparate treatment of Complainant, submits that there are approximately three thousand (3000) employees at Palo Verde Nuclear Generating Station (PVNGS), that Complainant's citation of several employees as the bases for a discharge of

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disparate treatment is nonsense and that Complainant cannot use the provisions of the ERA to challenge or void legitimate employment decisions of Respondent's management. (RX 79)

Hearings were conducted before this Administrative Law Judge for twenty-three (23) days in Phoenix, Arizona, during which time Complainant was afforded twenty-one (21) days to establish his

prima facie case. Respondent then presented its case and both sides offered many exhibits in support of their respective positions. The official hearing transcripts total over 6,300 pages. Post-hearing evidence has been admitted as identified and the parties filed post-hearing briefs, findings of fact and conclusions of law, as well as reply briefs.

Post-hearing documents have been identified as follows:

EXHIBIT NO.	ITEM	FILING DATE
CX 277A	Complainant's Motion to Supplement Record	02/16/95
CX 278	Complainant's Motion for an Extension of Time In which to Complete Post-Hearing Matters	04/24/95
RX77A	Respondents' Response suggesting May 22, 1995 as the date for filing briefs	04/24/95
ALJ EX 86	This Court's Grant thereof	04/15/95
ALJ EX 87	This Court's Grant of an Additional Extension	04/28/95
RX78A	Respondent's Request for Order Re: PostHearing Briefs	05/02/95
ALJ EX 88	This Court's Grant thereof	05/03/95
RX77	January 13, 1995 chart showing Complainant's salary from January of 1990 through March of 1993	06/06/95
RX 78	Respondent's policies/procedures in effect during the relevant time period	06/06/95
CX 279	Complainant's Motion to Extend Time for Filing Reply Briefs	06/20/95
ALJ EX 89	This Court's Grant thereof	06/29/95
CX 280	Complainant's Motion for Reconsideration (filed jointly for an extension of time to file reply briefs)	07/01/95
ALJ EX89	This Court's Order establishing a schedule for the filing of reply briefs	07/06/95
CX 281	Complainant's Proposed Findings of Fact	

and Proposed Conclusions of Law
06/28/95

RX 79 Respondent's Proposed Findings of Fact
and Proposed Conclusions of Law
06/28/95

RX 80 Respondent's Post-Hearing Brief
06/30/95

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RX81 Respondent's Opposition to Complainant's
Motion for Reconsideration
07/05/95

CX 282 Complainant's reply Brief
08/01/95

RX 82 Respondent's Reply Brief
08/07/95

The record was closed on August 7, 1995 as no further documents were filed. This matter is now ready for a decision based upon the totality of this closed record, including my observation of the demeanor of the witnesses presented by the parties.

The decision herein is based on a thorough review of all of the evidence before me and every document and all of the testimony has been thoroughly considered by me, although reference will be made to the most pertinent documents or testimony. Otherwise, this Recommended Decision and Order might exceed the 874 post-hearing pages filed by Complainant Certain findings of fact and conclusions of law, as filed by the parties, have been accepted, while others have been rejected, either as not corroborated by the record or as not based on credible testimony.

CONCLUSION

In summary, for two separate and distinct reasons, Complainant has failed to establish a *prima facie* case of discrimination with respect to Respondent's decision to terminate him. First, this closed record simply does not raise an inference that the termination of Complainant was based on something other than legitimate business considerations. Second, it is undisputed that neither the decision maker, Michael Shea, nor the Human Resource Managers who recommended that Complainant be terminated, had any knowledge that he had engaged in protected activity. In fact, no one involved at any stage of the investigation, including the Human Resource representatives who went to the scene and investigated the situation at the Glendale High School Parking lot, were aware that Complainant had engaged in any protected activity. Most had never even heard of him. In the case *sub judice*, the totality of this closed record leads ineluctably to the conclusion that Complainant was

terminated solely because he had knowingly and intentionally violated company rules relating to the use of alcohol on company policy,(sic) to wit, APS Van 377, and that such egregious misconduct warranted termination.

I totally agree with, and adopt as my own, the conclusion of Arbitrator Bolander: "If the act committed by the grievant isn't

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a discharge offense, I don't know what is." See RX 20 at APS/SB 00049.

Respondents were highly concerned about safety and had published rules regarding the consumption of alcoholic beverages. Complainant knew that alcohol was not to be consumed on company property and that he could be severely disciplined for alcohol consumption. Complainant and Mr. Pepple used the company van for personal use and their use of the van for the express intent of obtaining additional alcohol was extremely grievous. Complainant's conduct showed a complete disregard for his or Pepple's safety, the safety of the van, the safety of others and for the possible negative public circumstances that could have taken place. The unauthorized use of the van for the express purpose of alcohol consumption, coupled with Complainant's lack of responsibility for the van, for his or Pepple's safety, or for public consideration was itself grounds for termination; and, there was no evidence that he was treated differently than others in similar circumstances. (See RX2O)

In this proceeding, Complainant, in effect, asks that I second-guess Respondent as to the appropriate level of discipline to deal with Complainant's egregious conduct. As the United States Supreme Court has held, neither courts nor agencies should substitute their business judgment for that of employers in a discrimination case. *Furnco Constr. Co., v. Waters,* 438 U.S. 567, 578 (1978); *Mechnig V. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988) (courts do "not sit as a super-personnel department that re-examines an entity's business decisions").

Complainant, in my judgment, did not stand out as a so-called whistle-blower and Complainant, undoubtedly recognizing this fact, tried to enhance his image as a whistle-blower by most glaring bootstrapping efforts, such as attempting to align himself with several individuals who had been declared in the past to be whistle-blowers by my colleagues at the Office of Administrative Law Judges. However, this Administrative Law Judge reminded Complainant several times that such bootstrapping was not probative until such time as the Complainant had established his *prima facie* case that the Act had been violated. As already found above, Complainant has not established his *prima facie* case and the bootstrapping argument, i.e., in terms of an alleged hostile work environment, becomes largely irrelevant as Complainant has not established the existence of such environment at this time.

This matter represents the usual credibility problems

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encountered in a whistle-blower case and the hearing transcripts readily reflect the divergent testimony on the crucial factual issues herein. I find and conclude that the version of events as testified by Respondent's witnesses is more credible as Complainant's testimony on key points varied several times up to and including the last day of hearing before me.

Complainant was the last person to testify on his behalf as part of his case-in-chief and, although all other witnesses were sequestered, Complainant, along with a representative for Respondent, sat through all of the testimony and he had the benefit of hearing that testimony prior to the time he was placed under oath.

To illustrate Complainant's lack of credibility, I shall briefly highlight his suggestion that he had submitted a Condition Report Disposition Request ("CRDR") concerning the August, HIC (High Intensity Container). The fact, is however, that no one has ever seen this CRDR, which apparently disappeared magically. Any suggestion that Complainant's supervisors would have declined to submit a CRDR makes no sense, in light of the fact that Palo Verde employees were encouraged to raise safety concerns and to file CRDRs and did, in fact, file them routinely. When problems had earlier been noted with the same HIC in April 1992 (prior to its being prepared for shipment from Palo Verde), those problems were reported and thoroughly investigated. Similarly, with respect to the other HIC (December 1992), the NRC specifically recognized the company's own comprehensive investigation and disclosure of the problems that had arisen.

Furthermore, Complainant's contention that he submitted a CRDR relating to the HIC is again belied by his own conduct. His own testimony and exhibits reflected that he had saved other company documents, including two rather insignificant CRDRs. Furthermore, based on standard operating procedures, which were employed when he submitted other CRDRs, if he had submitted a CRDR concerning the August HIC, he would have received notice that his CRDR had been filed and assigned for investigation within days after it was submitted. Thus, if in fact he had submitted such CRDR, Complainant would have been on notice immediately that it had never found its way to the CRDR department. Clearly, Complainant's story concerning the CRDR is no more reliable than his fictionalized account of meetings that never took place.

Although this hearing focused on Straub's termination, it is significant to recall that the company's investigation focused

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simultaneously on both Straub and Pepple and the totality of events that had transpired on February 10, 1994. There was no evidence presented in this hearing that Pepple had ever engaged in protected activity. Yet, from the outset of the investigation, through Michael Shea's decision that the termination was warranted, Straub and Pepple were treated identically.

Moreover, this closed record leads inescapably to the conclusion that neither Michael Shea, as the final decision maker, nor Human Resource managers, Marlene Shelton and Scott Mac Farland, who recommended that Complainant be terminated, had any knowledge that Complainant had engaged in any protected activity.

Complainant was not treated in a disparate manner as similarly situated employees violating company rules were also terminated by Respondents, while other, non-similarly situated employees, may have been administered lesser forms of discipline.

As is readily apparent, the decision to terminate anyone's employment is an extremely difficult one to make. Based on his position, Michael Shea was called upon to make that decision. He acted cautiously and carefully, reviewing the evidence of misconduct and receiving information from his human resource advisors about those company rules that had been violated and about prior discipline in such cases. Balanced against the overwhelming evidence of legitimate grounds for termination, Complainant failed to produce any evidence, let alone evidence which proved, that Mr. Shea's stated reasons for his decision was merely a pretext to discriminate.

Accordingly, the complaint must fail. In this regard, see *Floyd v. Arizona Pub. Serv. Co./Palo Verde Nuclear Generating Station*, 90-ERA-39 (Sec'y, Sept.23, 1994); *Merriweather v. Tennessee Valley Authority*, 91-ERA-55 (Sec'y, Feb. 4, 1994); *House v. Tennessee Valley Authority*; 91-ERA-42 (Sec'y, Jan. 13, 1993).

On the basis of the totality of this closed record and having observed the demeanor and having heard the testimony of the witnesses, including a less-than-candid Complainant, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

APPLICABLE LAW - - DISCUSSION

The employee protection provision of the Act provides that:

> (a) Discrimination against employee. (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)-
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> (A) notified his employer of an alleged violation of the Act
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> (B) refused to engage in any practice made unlawful by this Act... if the employee has identified the alleged illegality to the

> employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act...;
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act... or a proceeding for the administration or enforcement of any requirement imposed under this Act...;
> (E) testified or is about to testify in any such proceeding or;
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act, --

42 U.S.C.S. § 5851 (Supp. May, 1993).

The Complainant has the burden of establishing a *prima facie* case of discrimination under the ERA. The complainant must show, by a preponderance of the evidence, that he engaged in protected activity, that he was subjected to adverse action and that the Respondent was aware of the protected activity when it took the adverse action against the complainant. In addition, the Complainant must produce evidence sufficient to at least raise an inference that the protected activity was the likely motive for the adverse action. See *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-9. If the Complainant satisfies his burden of presenting a *prima facie* case, the burden of production shifts to the Respondent to produce evidence that the adverse action was taken for legitimate, non-discriminatory reasons. See *Dartey* at 8.

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Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. See S. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK 35-47 (1990). Examples of the types of employee conduct which the Secretary of Labor has held to be protected include: making internal complaints to management,[2] reporting alleged violations to governmental authorities such as the Nuclear Regulatory Commission ("NRC") and the Environmental Protection Agency, threatening or stating an intention to report alleged violations to such governmental authorities, and contacting the media, trade unions, and citizen intervenor groups about alleged violations. *Id.*

During the course of hearing, Complainant's representative suggested that as a result of the 1992 amendments to the Energy Reorganization Act (ERA), once Complainant establishes that he engaged in protected activity,[3] the burden shifts to Respondents to prove, by clear and convincing evidence that the

employment action would have been taken even if Straub had not engaged in such activity. According to Respondents, Complainant has blatantly misstated the applicable law.

The ERA specifically states that a violation occurs "only if the Complainant has demonstrated that any [protected conduct]... described in...this section was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. §5851(b)(3)(C). Thus, as in any whistle-blower or discrimination suit, the Complainant must ultimately prove that the Employer acted based on an unlawful motive.

The United States Supreme Court has established a three-part "shifting burdens" analysis applicable to all discrimination cases. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981); *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Both the Circuit Courts of Appeals and the Secretary of Labor have relied on Title VII authority in whistle-blower cases, and have explicitly adopted the shifting burdens analysis. See *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Bryant v. EBASCO Serv., Inc.*, 88-ERA-3 1 (Sec'y, April 21, 1994).

Complainant has the initial burden of proving a *prima facie* case. To do so in an ERA case, he must demonstrate that he engaged in protected activity, that he was subjected to adverse action, that the decision makers for the Respondents were aware of the protected activity when the adverse action was taken; and, although the circumstances of any particular case will obviously differ, Complainant must also present sufficient evidence to

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raise an inference that the protected activity was the likely reason for the adverse action. *Floyd v. Arizona Pub. Serv. Co./Palo Verde Nuclear Generating Station*, 90-ERA-39 (Sec'y, Sept. 23, 1994; *Shusterman v. EBASCO Serv., Inc.*, 87-ERA-27 (Sec'y, Jan. 6, 1992; *Jopson v. Omega Nuclear Diagnostics,* 93-ERA-54 (ALJ, Feb. 22,1 994); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y, June 28, 1991). In a discharge situation involving a specific offense for which the Employee was terminated, evidence of qualifications does not create an inference of discrimination. Rather, additional evidence which implies a causal connection between the basis for protection and the discharge will be necessary to establish a *prima facie* case. See, e.g., *Green v. Armstrong Rubber Co.*, 612 F.2d 967 (5th Cir.), *cert. denied*, 449 U.S. 879 (1980).

If Complainant is successful in establishing a prima facie case, the burden shifts to the Respondent merely to produce evidence of a legitimate reason for its employment action. The Complainant "retain[s] the burden of proving by a preponderance of the evidence that the Respondent's action was motivated, at least in part, by discrimination." *Saporito v. Florida Power & Light Co.* and *Saporito v. ATI Career Training Ctr/Florida Power & Light Co.* (consolidated), 90-ERA-27 & 90-ERA47

(Sec'y, Aug. 8, 1994) n.3. Complainant can meet this burden by demonstrating "either that Respondent's proffered reasons for its actions were pretextual or that it is more likely than not that discrimination was a motivating factor." *Id.* If, but only if, the trier of fact concludes that discrimination was a contributing factor, does the burden shift to Respondents to prove that they would have made the same decision "based on legitimate factors even if the Complainant had not engaged in protected activity." *Id.*

The amendment to the Act leaves the respective shifting burdens of the parties intact. As before, "Complainant always bears the burden of proof that the intentional discrimination has occurred." *Jopson v. Omega Nuclear Diagnostics*, supra, p. 8; *Dysert v. Florida Power Corp.*, (93-ERA-21) (ALJ, June 3, 1994) (Complainant must first prove that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint); *Nerriccio v. Connecticut Yankee Atomic Power Co.*, 93-ERA-50 (ALJ, June 27, 1994) (if Complainant establishes *prima facie* case and Respondent articulates a legitimate reason for its action, Complainant must prove pretext).

The new statutory language, 42 U.S.C. §5851(b)(3)(D), changes only the standard by which an Employer can avoid liability in a dual motive case. Under the amendment, after

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Complainant proves that a Respondent acted, at least in part, based on a discriminatory motive, Respondent may avoid liability by producing "clear and convincing evidence," and not merely a "preponderance of the evidence," that it would have made the same decision based solely on legitimate factors. See *Dysert v. Florida Power Corp.*, *supra*.

In this case, the new statutory language is wholly immaterial. This is not a dual motive case. Complainant failed utterly to meet his threshold burden of proving that any employment action concerning him, including the decision to terminate his employment, was motivated at all by considerations of protected activity.

1. Joseph Roy B. Straub ("Complainant" or "Straub") was employed by Arizona Public Service Company (APS) as a Radiation Technician (Rad Tech) assigned to the Palo Verde Nuclear Generating Station (PVNGS) from December 18, 1989 until his termination on February 15, 1994. (TR 3880, ll. 13-18; RX 28, RX 17.)

2. Arizona Public Service Company (Respondent) is an "employer" pursuant to the Energy Reorganization Act of 1974 as amended.

3. Complainant was an "employee" pursuant to the Energy Reorganization Act of 1974 as amended.

4. Complainant has failed to produce evidence sufficient

to prove that any APS action adverse to him was in any way connected to, let alone motivated by, any protected activity under the Energy Reorganization Act (herein "The Act").

GENERAL ISSUES OF CREDIBILITY

5. Complainant's testimony concerning the events of February 10, 1994, for which he was terminated, changed every time he sought relief before a decision-making body. (TR4769, ll. 12-23; 4470, ll. 5-25; 4473, ll. 22-25; 4474, ll. 1-20; 4475, ll. 3-25; 4476, ll. 1-18; 4785, ll. 2-25; 4786, ll. 1-25; 4787, ll. 1-3, 19-25; 4788, ll. 1-25; 4789, ll. 1-25; 4790, ll. 1-25; 4791, ll. 1-23; 4792, ll. 1-25; 4793, l. 1; 4797, ll. 17-25; 4798, ll. 1-15; 4801, ll. 2-25; 4802, ll. 1-2; 4803, ll. 1-18).

6. Complainant made material changes in his sworn testimony in each proceeding, i.e., unemployment compensation hearing, equity arbitration hearing, deposition and hearing

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testimony in this proceeding, regarding the time of arrival and departure at the Nugget Bar. (TR 4765, ll. 8-25; 4766, ll. 1-25; 4767, ll. 1-7; 4768, ll. 6-14; 4781, ll. 2-25; 4782, ll. 1-25; 4783, ll. 1-25; 4784, ll. 1-25; 4785, l. 1)

7. Complainant repeatedly changed his testimony on significant points between the time he gave his deposition testimony on September 21, 1994 and his hearing testimony before me less than four months later.

8. Complainant was not even present at PVNGS on several dates on which he claims to have met and raised safety concerns with APS managers or supervisors. (TR 6187 ll. 6-8) This fact was confirmed by both the company's security and payroll records.

9. Complainant could not have identified concerns to his supervisor, Dave Wanslee, during the week prior to August 20, 1992, because there was no overlap in the work schedules of Wanslee and Straub. (TR 6190, ll. 4-14, 23-25; 6191, ll. 1-25; 6192, ll. 1-2)

10. Complainant changed his testimony as to whether he was ever offered the same settlement deal as Pepple. (Testified 'yes', TR 4777, ll. 3-7, ll. 14-21; testified "no", TR 4870, ll. 18-25; 4871, ll. 1-5)

11. Complainant changed his sworn testimony regarding his decision to leave the Nugget and wait in the van for Pepple. (TR 4782, ll. 10-14, 23-24; 4766, ll. 4-23; 4767, ll. 1-2, 10-12; 4782, ll. 4-9, 20-25; 4783, ll. 1, 15; 4784, ll. 1-5)

12. Complainant changed his sworn testimony regarding whether he left the Nugget Bar with Pepple. (TR 4783, l. 15; 4784, ll. 1-5, 7, 16-25; 4788, ll. 13-25; 4789, ll. 1-6, 20-25; 4790, ll. 1-2, 12-18; 4791, ll. 4-14)

13. Complainant changed his sworn testimony regarding his

knowledge prior to termination that the company vans were not to be used for personal use. (No Knowledge: TR 4802, ll. 7-21; yes, had such knowledge: Straub depo RX 28 at 175, l. 14)

14. Complainant changed his sworn testimony regarding whether Michael Shea's April 20, 1993, memo was in response to concerns raised by Straub. He testified, at page 4103, ll. 5-9 of the transcript, that he believed the April 20, 1993 memo was triggered by his concerns. Later, at page 4104, ll. 1-3, Straub said "it could very well have been..." in response to concerns he

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had raised but admitted he did not have knowledge to support his earlier contention. Finally, on page 4104, ll. 6-11, Complainant admitted that he had never even dealt with Mr. Shea on his safety issue prior to April 20, 1993.

15. Complainant changed his sworn testimony regarding John Gaffney's reasons for selecting Linares for a position in the Outage Planning Group that Straub wanted. (TR 4177, ll. 2-25; 4178, ll. 1-6, 14-25; 4179, l. 1)

16. Complainant testified that had received counseling due to stress created by a hostile work environment. The records of Straub's counselor, however, demonstrate that he only saw her before the alleged incidents of retaliatory treatment. They further reflect that Straub visited with his counselor to discuss his marital problems and that he did not discuss work at all. (TR 4392, ll. 24-25; 4393, ll. 1-25; 3494, ll. 1-15)

17. Complainant's own counselor, Dorothy Willard, described him as someone who refused to accept responsibility for his own actions. His failure to understand why he might be terminated for the van incident on February 10, 1994, was not dissimilar to his fai1ure to understand why his wife might want to divorce him after finding out that he had been having an affair for 8-9 months. (TR 4641, ll. 17-21; 4642, ll. 2-24)

18. Complainant repeatedly testified as though he had personal knowledge of a fact, but when pressed for a factual basis, admitted that he did not have personal knowledge of the "fact" to which he had testified. (TR 4548, ll. 17-25; 4548, ll. 23-25; 4549, ll. 1-16) (Straub testimony generally)

19. Complainant clearly misled the Arizona Department of Economic Security in his application for unemployment compensation. Complainant, in describing the van incident for which he was terminated, suggested to the Department of Economic Security in an unemployment insurance separation questionnaire that he had been fired simply because he was sleeping in a company van. (TR 4645, ll. 10-25; 4646, ll. 1-15; CX 159) Straub claimed, during the unemployment hearing, that he did not know the reasons for his termination other than "misconduct on the company van" (RX 23, pp. 124-125) However, on February 15, 1994, the date of Straub's termination, after he asked what *rules* he had violated, he was given a portion of a

document which specifically listed the rules and policies that Straub and Pepple had violated. (TR 4648, ll. 6-13; 4649, ll. 9-16; CX 142, document listing reasons for termination)

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20. Complainant changed his statement as to whether the other occupants of the van on February 10, 1994, had been drinking alcohol. (TR 1127, ll. 11-19; 1135, ll. 16-19; 1693, ll. 12-23; 1694, ll. 19-23; 4032, ll. 18-21; 4033, ll. 4-6)

21. The record in this proceeding plainly reflects that Straub also fabricated documentary evidence. Specifically, he falsified entries in his calendar, which was offered as an exhibit, in order to create a false impression that he had meetings with supervisors during which he allegedly raised safety concerns. (TR 4550, ll. 15-25; 4151, ll. 1-5; 4621, ll. 3-21; 4622, ll. 13-25; 4623, ll. 1-11; 4624, ll. 7-25; 4625, ll. 7-25)

22. Submitted on Straub's behalf was CX 176, documents related to Hank Tomlinson, an HR (Human Resource) representative at PVNGS. Complainant's handcrafted exhibit misrepresents the packet that Tomlinson sent Straub following Straub's termination, in order to assist Straub on the appeals process. Certain materials had been deleted, other material had been added. (TR 5568, ll. 9-25; 5569, ll. 1-25; 5570, ll. 1-7)

23. Complainant's lay representative failed to provide a critical document, the Tom York report regarding the February 10, 1994 incidents, to his experts, Joe Collier and Jon Sellers; therefore, their opinions on the issue of Straub's alcohol impairment were not only irrelevant, but also based on information which was materially incomplete. (TR 774, ll. 22-25; 775, ll. 1-13; 888, ll. 8-14; Seller Deposition Exhibit 1; Seller Deposition p. 8, ll. 13-25; 9, l. 1)

24. Complainant also fabricated a story that he submitted a Condition Report Disposition Request ("CRDR") concerning the August 1992 HIC work. *See* discussion, *supra*, at findings 74 through 76.

THE TERMINATION DECISION

25. Complainant's employment was officially terminated by letter from Straub's supervisor, Terry Gober, dated February 15, 1994, which stated: "This letter is to inform you that your employment with Arizona Public Service Company has been terminated effective February 16, 1994 for misconduct with APS vans." (RX 17)

26. On February 10, 1994, Complainant left work in an APS van. He drove the company van from the plant. (TR 4028, ll. 5-12) The van had four other APS employees as occupants, Larry Pepple,

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Rex Warner, Jimmy Clark, and Pat Kikendahl. (TR 4028, ll. 22-25;

5099, ll. 10-12)

27. Complainant, while driving from the plant along Wintersburg Road, stopped at a general store. Two six packs of beer were purchased and carried onto the APS van in a paper bag. (TR 5093, l. 1; 5094, ll. 5-15)

28. All passengers except Pepple and Straub were dropped off at their designated van stop areas. Pepple and Straub continued on to the Nugget Bar, with Straub still driving the van. Both Straub and Pepple went into the bar. (TR 4034, ll. 2-19).

29. During this trip, Straub and Pepple consumed the beer on company property, i.& company van number 377. (TR 1127, ll. 11-14; 1135, ll. 16-17; 5491, ll. 7-9; 4032, ll. 6-11; 4797-4798 ll. 17-25, 1-8; 5096, ll. 18-23).

30. Complainant also admitted during deposition (Straub depo, Exhibit RX 28, p. 171, l. 2), at the hearing (TR 4775, ll. 3-11; 4797, ll. 17-21; 4798, ll. 2-15), and to company security investigator George Werrian, prior to his termination (TR 5491, ll. 10-13), that he drank beer while driving the van.

31. At the Nugget Bar both Straub and Pepple continued to consume alcoholic beverages. (TR 664, ll. 24-25; 665, ll. 1-25; 666, ll. 1-17; 4668, ll. 5-7; 5106, ll. 6-15; 5107, ll. 1-13; 3520-3521, ll. 16-25, 1-10; 1127, ll. 11-25.)

32. Complainant admitted that driving the company van while drinking beer was a violation of company van rules. (TR 4063, ll. 11-14; 4800, ll. 10-12)

33. Straub knew that "just having beer in the van would be another violation of van rules." (TR 4801, ll. 18-25; 4802, ll. 1-3; Straub depo page 175)

34. Straub admitted knowing that there was a sign in his van notifying employees that no alcoholic beverages were permitted on the van. (TR 4801, ll. 2-7)

35. Straub knew that in the bar Pepple was consuming schnapps liquor in addition to beer. (TR 4036, ll. 2-9; 4037, 1. 25; 4038, ll. 1-2)

36. Straub turned the keys to the company van over to Pepple with the understanding that Pepple was going to drive the

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vehicle. He did so even though Straub knew Pepple had consumed significant quantities of alcohol and was, in fact, "hammered." (TR 4038, ll. 2-9; 4037, l. 25; 4038, ll. 1-2; 4066, ll. 1-3)

37. Although Straub lived southwest from the Nugget Bar and very close to it, Straub and Pepple were found by school officials on the morning of February 10, 1994, asleep or passed out in the van in the Glendale High School parking lot, which is

approximately 5.5 to 6 miles northeast of the Nugget Bar. (TR 5111, ll. 17-21; 5114, ll. 5-12; 5207, ll. 15; 5208-5209, ll. 725, 1-2; 5210-5211, ll. 11-25, 1-15; 4956, ll. 5-25; 4957, ll. 1-7; 4955, ll. 2-7, 18-25; 4954, ll. 17-22; CX 255)

38. Peter June, Assistant Principal at Glendale High School, became concerned about students observing two men apparently drunk in the APS van. (TR 5214) The van was blocking the drive and had broken beer bottles beside it. (TR 5208) A window was open with a leg hanging outside it. (TR 5211) Mr. June contacted the Glendale Police Department. {TR 5213)

39. Officer Vasquez of the Glendale Police Department, responding to a call for police assistance, went to the Glendale High School on the morning of February 10, 1994, found Straub asleep in the passenger seat of the APS van with beer bottles visible both inside and outside the van. (TR 4954, ll. 17-22; 4955, ll. 1-23; 4956, ll. 9-25; 4957, ll. 2-7)

40. Officer Vasquez awakened Straub, observed that Straub's speech was slurred and that he was off balanced and confused. After performing sobriety tests, including the HGN test, the officer determined that Straub was impaired by alcohol. (TR 4960, ll. 2-25)

41. Prior to February 10, 1994, Officer Vasquez had been trained and experienced in observing and determining whether motorists are impaired by alcohol or drugs. Vasquez was not acquainted with Straub as of to February 10, 1994. (TR 4946, ll. 21-25; 4947, ll. 1-7; 4965, ll. 14-20)

42. After Respondent was notified of the situation in the school parking lot, it sent corporate human resources investigators to the scene. Tom York, one of the investigators, interviewed Straub. Straub appeared to him to be significantly impaired. Moreover, Straub admitted to York that he and Pepple had taken the van to the Nugget Bar, that he had consumed several beers and shots of 100 proof schnapps there and that he had become drunk. (CX 135)

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43. Prior to February 10, 1994, York had both training and experience in observing employees who might be under the influence of alcohol or drugs. (TR 671, ll. 18-25; 672, l. 1-25)

44. Shortly after he left the scene on February 10, 1994, York prepared a written summary of his observations and his interview of Straub. There is no evidence to suggest that York did not use his best efforts to summarize these events as accurately as possible. He certainly was not biased. ln fact, prior to that date, he had never even met or heard of Straub. (TR 664, ll. 16-18; 670, l.25; 671, l. 1; 695 ll. 5-11)

45. Mr. Pepple credibly testified before me that Straub had also been drinking beer and other alcoholic beverages at the

Nugget Bar on February 10, 1994. Pepple had been terminated with Straub as a result of their activities on February 10, 1994. (TR 5088, l. 1; 5089, ll. 1-5; 5099, ll. 1-13; 5100, ll. 1-23; 5114, ll. 5-17) No evidence was presented to suggest that Pepple would testify based on any bias in favor of the company. On the contrary, Pepple and Straub admitted that they were friends. (TR 476, ll. 9-18; RX 29, Pepple depo. at 8, ll. 1-7)

46. In any event, Straub's level of impairment is largely irrelevant. Regardless of precisely how much he had drank, he clearly violated the company rules for which he was properly terminated. In addition, even accepting Straub's story as to how much he had to drink, as an arbitrator later found, Straub jeopardized his own safety, as well as that of Pepple, the general public and the van, by turning the van's keys over to Pepple. (RX 20)

47. Arizona law, A.R.S. § 4-244(22) states that it is unlawful "[f]or a person to operate a motor vehicle on any highway while consuming spirituous liquor." A.R.S. section 4-244 (20) states that it is unlawful "for a person to consume spirituous liquor in a public place, thoroughfare or gathering."

48. Prior to January 1, 1994, PVNGS employees had driven the vans to and from work under a van program that was administered by another company, Sanderson Ford. Sanderson not only ran the program, it also owned the vans and enforced the van rules. (TR 608, ll. 6-22; 1957, ll. 24)

49. PVNGS employees were notified by various means, including the following, that effective January 1, 1994, the Sanderson vans would become APS fleet vehicles: (TR 2605-2606,

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ll. 22-25, 1-5; 2469, ll. 12-22; 3003, ll. 11-22; 3004, ll. 5-25; 3005, ll. 1-25; 3006, ll. 14-16)

a. "Palo Verde News," dated December 10, 1993. (EX 41 at APS/SB02173)

b. "Palo Verde News," dated December 27, 1993, (EX 41 at APS/5B02174)

c. PVNGS VAN POOL EXPRESS MONTHLY NEWSLETTER," dated January 12, 1994, which states "The vans will have the APS logo on them. As APS employees, we all are expected to conduct ourselves in a manner as not to discredit APS. Many policies and procedures, including Positive Discipline, will cover our conduct on the vans; some of these are associated with misuse of company property, destruction of company property, general conduct of APS employees, and Fitness-for-Duty." (EX 41 at APS/SB02177-8)

50. On or about January 1, 1994, the vans used for employee transportation to and from PVNGS did, in fact, become APS property, subject to APS policies and procedures, All employees knew or were expected to know about these new van rules as numerous meetings were held relative thereto. (TR 2465, ll. 5-8; 2468, ll. 2-12; 2471, ll. 1-5; RX 41; RX46)

51. Marlene Shelton, Director of Human Resources for PVNGS,

recommended that both Straub and Pepple should be terminated. (TR 2674, ll. 2-7) Ms. Shelton was convinced that both Straub and Pepple had violated numerous company rules and policies. (TR 2698, ll. 7-9, ll. 17-21)

52. Scott MacFarland, as Manager of Employee Relations for PVNGS, also recommended that it would be consistent with company policy to terminate Straub and Pepple. (TR 1905-1906)

53. Michael Shea, whose title in February, 1994, was Site Radiation Protection General Manager, was the sole decision maker in the matter of Straub's termination. (TR 3632-3638; 2668)

54. Mr. Shea decided that Straub and Pepple ought to he terminated, based on his belief that their conduct had violated a number of company rules and, in addition, violated the spirit of the message that had been sent by APS' CEO, Mark DiMichele, that serious safety violations would not be tolerated. (TR 3812-3813; CX 141) No evidence was presented that Pepple had ever engaged in protected activity.

55. Mr. Shea believed - and there was and is strong evidence to support that belief -- that Straub had violated the following APS policies/procedures which would individually or

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collectively warrant termination:

a. PVNGS Work Rules. (CX 128)
b. APS Employee Handbook. (CX 127, p.7).
c. APS Van Rules. (TR 2653-2655; RX 41)

56. Mr. Shea, prior to making his decision, had not only received the recommendations to terminate, but also had attended a meeting during which evidence of misconduct relating to the February 10, 1994 van incident had been reviewed. Investigative reports had already been prepared by Tom York, as well as by another HR representative who went to the scene, Jerry Comer, and George Weiman, as company security investigator. Mr. Shea also asked for a summary memorandum, which summarized some of the critical facts and listed the relevant company rules to enable him to determine whether termination was appropriate. (TR 3745 ll. 14-25: 3746, ll. 1-25; 3747, ll. 1-10)

57. Complainant appealed his termination to an arbitrator, pursuant to the company's Equity process. Arbitrator George Bolander held a hearing in June 1994. Straub was represented by William Dixon, Senior National Representative with the Utility Workers Union of America (RX 20) and a full evidentiary hearing was conducted. Following the hearing, the arbitrator upheld the decision to terminate. (RX 20)

58. Arbitrator Bolander determined Pepple drove the van in an intoxicated state, a serious safety violation for which Straub had to accept responsibility. (RX 20 at APS/SB00049).

59. Arbitrator Bolander cited Straub's own testimony that

Pepple was "hammered" at the bar. The arbitrator concluded that Straub had shown a complete disregard for his or Pepple's safety, the safety of the van, and for the possible negative public circumstances that could have taken place. (RX 20 at APS/SB 00048)

60. Arbitrator Bolander stated: "I concur with the company that the unauthorized use of the van for the expressed purpose of alcohol consumption, coupled with Mr. Straub's lack of responsibility for the van, for his or Pepple's safety, or for public consideration to be worthy, in itself, of termination." (RX 20 at APS/SB 00048). He further stated: "The company's response by classifying 'drinking alcohol while driving' as a serious safety rules violation. I agree with the company." Arbitrator Bolander specifically found that company policy clearly requires employees to abstain from alcoholic consumption while on company property and, if employees do drink, termination

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is the penalty. (RX 20, p. APS/SB 00049)

61. The Arizona Department of Economic Security denied unemployment compensation to Straub because he had engaged in misconduct (RX 18, RX 19). The Decision of the Administrative Law Judge stated: "The claimant has admitted violating the company rule against having and consuming liquor on the employer's property, to wit: the company car pool van. The employer's rule prohibiting alcoholic beverages on the carpool van, albeit after working hours, is reasonable and is apparently enforced in the sense that all incidents communicated to management are investigated and, where appropriate, discipline follows. The claimant's use of alcohol on the employer's property specifically the van, can be presumed to be misconduct in that it adversely affects the employer in it's (sic) capacity as an employer. The use of alcohol in a company vehicle, albeit after hours, puts the employer at risk for all manner of vehicle and personal injury." (RX 19, p. AP/SB00041)

62. Complainant himself admitted that his conduct in the February 10, 1994 van incident warranted serious discipline up to and including a DML, decision making leave, the second highest level of discipline next to termination. (TR 4665, ll. 18-21; 4066-4067 ll. 24-25, 1-4)

63. Complainant was terminated properly and in a manner consistent with all PVNGS policies and procedures. (TR 3095 ll. 3-8; TR. 3853, ll. 80-13.)

64. Similarly, with respect to his appeal rights, Complainant was not treated differently than others who are terminated. (TR 5349-5357; 5434-5437; 5442; 5570-5571; 5576-5583, RX 38; CX 176; 3557-3560, CX 17, 18, 20)

65. Complainant clearly understood the incident for which he had been terminated; he was given those company rules and policies that had been implicated by his actions; he was provided

with the brochure which explained appeal rights and options, together with numbers to call for further information; he did in fact have the opportunity to speak with several individuals about his appeal options. (TR 5358, ll. 21-25; 5359, ll. 1-12; 5434, ll. 7-16; 5436, ll. 1-5; 5437, ll. 23-25; 5438, l. 1; 5813, ll. 8-17; 5814, ll. 3-23; 4804, ll. 1-3)

66. Respondent clearly explained to the Complainant the process for appealing his termination (TR 5522-5223; 5358-5362, ll. 2-25, 1-7; 5437-5438, 5442, ll. 1-6; RX 49; Shea memo, CX

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134), and provided him with the standard options for appealing a termination decision. Respondent provided information and opportunities consistent with its policies and procedures for appeal through the company's equity process. (TR 5563-5571; 5358-5361; Exhibit Equity Procedure - CX 215, CX 210; see also correspondence CX 204; CX 216) As to every aspect of his termination, Complainant failed to produce evidence which even suggested, let alone proved, that he was treated differently because he had engaged in protected activity.

KNOWLEDGE:

67. Ms. Marlene Shelton, who made the recommendation regarding Straub's termination, had no knowledge that Complainant had raised safety concerns or had otherwise engaged in protected activity. (TR 2479-2480, ll. 25, 1-4; 2715, ll. 18-22, 2947, ll. 8-25, 2948, ll. 1-20, 2952 ll. 6-21)

68. At the time he decided to terminate Complainant, Michael Shea did not have knowledge that Complainant had engaged in any protected activity. (TR 3730, ll. 6-7; 3825-3826, ll. 2-25, 1-5; 3830-3831, ll. 20-25, 1-5; 3852, ll. 7-16)

69. The individuals who participated in a significant way in the investigation itself were: George Weiman, Tom York, Jerry Comer, Officer Vasquez and Dave Heler. (TR 657, ll. 8-9; 695, ll. 5-8; 1178-1179, ll. 24-25, 1; 1707, ll. 3-25; 1708, ll. 10-13; 4955-4956) At the time of their investigation and subsequent reports, none of these individuals had any knowledge that Complainant had engaged in activities protected under the Energy Reorganization Act (TR 3198, ll. 8-24; 4041, ll. 23-24; 4042, ll. 17-21; 4965, ll. 14-20)

PROTECTED ACTIVITY

70. Complainant did not raise safety concerns or otherwise engage in protected activity during August, 1992, in connection with the transporting of a HIC (High Intensity Container). (TR 5877, ll. 7-12; 6084, ll. 6-17; 6134, ll. 3-8; 5670, ll. 11-14; TR 5677, ll. 17-19; 5679, ll. 6-8)

71. Complainant's protected activity was extremely limited and far from extraordinary. He engaged in protected activity in 1993 when he vaguely suggested that there had been procedural violations during the August 1992, HIC job, while discussing his

own personnel-related complaints to investigators in the Human Resources and Employee Concerns Departments. (TR 408, ll. 1-9;

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1609, ll. 20-25)

72. However, there were no procedural errors with respect to the August, 1992 HIC work. (TR 5669, ll. 24-25; 5670, ll. 1-2; 5687, ll. 9-25; 5715, ll. 20-24; 5769, ll. 12-24)

73. Because Complainant could not specify what concerns he had relating to the August 1992 HIC job during discussions with his unit manager, Bill Sneed, in mid-1993, Sneed asked Complainant to write a CRDR (Condition Report Disposition Request) designed to initiate an investigation into whatever concerns Complainant may have had (TR 440, ll. 11-20; 373, ll. 13-25; 374, l. 1; 388, ll. 11-16; 4011-4012, l. 25)

74. Although Complainant testified that he prepared a CRDR and gave it to Sneed, his testimony on that point is not credible. His supervisors and manager all testified that they have never seen such a CRDR (TR 366, l. 25, 367, ll. 1-2; 388, ll. 11-16; 440, ll. 19-25; 441, ll. 1-14) Furthermore, Tim O'Keefe, who is responsible for administering the CRDR program, testified that he had conducted an exhaustive search and determined that no CRDR prepared by Complainant regarding the August, 1992 HIC had ever been filed. (TR 5625, ll. 24-25; 5626, ll. 1-6; 5631, ll. 7-10; 5632, ll. 22-25; 5633, ll. 1-13)

75. Moreover, Mr. Sneed had encouraged Complainant to submit a CRDR in the first place, just as Mr. Sneed had encouraged employees generally to raise safety concerns. (TR 440, ll. 21-23) And a CRDR and problem report relating to the same HIC Had been submitted and investigated in April 1992. Furthermore, based on his experience as he had filed other CRDRs, Complainant would have known immediately, based on standard operating procedures, if in fact he had prepared a CRDR, because of the usual "feedback" from the individual at PVNGS assigned to look into the CRDR. Accordingly, I find and conclude that Complainant, contrary to his testimony, did not file a CRDR as he certainly would have taken appropriate follow up steps to determine its status as he was well aware of the procedures relating thereto. (TR 388, ll. 11-16; 5632-5633, ll. 22-25, 1-13)

76. The concerns which Complainant raised relating to the August, 1992 HIC job were not related to the December HIC incident which resulted in NRC enforcement action in late 1993. Moreover, he had not even worked on that HIC. (TR 5670, ll. 7-10; 5684-5685, ll. 20-25, 1-5; 3820, ll. 8-11; 3821, ll. 16-19) (This is another example of Complainant's bootstrapping argument.)

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77. Notwithstanding the fact that Complainant testified at the hearing (TR 4624, ll. 1-18) that he met with Bill Sneed on November 3, 1992, he could not have done so. Official business

records established that Complainant was not even present at PVNGS on November 3, 1992. (TR 6181-6182, ll. 12-25, 1-4; 6186, ll. 3-20; 6192, ll. 2-12; RX 72; RX 75)

78. Notwithstanding the fact that Complainant testified that he met with his supervisor, Dave Wanslee, on August 10, 1992, he could not have done so, since Complainant was not present at PVNGS on August 10, 1992. (TR 6187; 6191; RX 72; RX 75) Mr. Wanslee did not recall Complainant raising procedural concerns regarding the August HIC. (TR 6084, ll. 11-14)

79. In early 1993, after Complaint (sic) learned that Human Resources was investigating an allegation of racial misconduct that had been filed against him, he first went to the Human Resources Department to complain about his supervisors. (TR 5037, ll. 5-22) At various times during February and March 1993, Complainant complained about discipline he received for the racial incident and another incident of inappropriate conduct. He also complained about the size of his raise and about an assignment which Complainant did not like. During those discussions, Complainant suggested that his supervisor did not perform the August 1992 HIC job properly, and that his supervisors had ignored his suggestions regarding the HIC job. (RX 7)

80. Although Complainant filed a concern with the Employee Concerns Department in July 1993, that concern was not at all about safety issues. Rather, he complained about alleged favoritism resulting from an alleged violation of the company's nepotism policy. Specifically, be complained that a woman employee who had married a foreman was not doing her fair share of the work. (CX 236 at APS/SB02828)

THERE IS NO EVIDENCE OF PRETEXT

81. Respondent has engaged in a conscientious and consistent effort to send a message to its supervisors and line employees that employees are encouraged to raise safety concerns and that discrimination against those who raise concerns will not be tolerated. (TR 3204-3207)

82. That message was reinforced when a supervisor who did discriminate, Frank Warriner, was dismissed. (TR 3186-3187)

83. As a manager, Michael Shea encouraged employees to

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identify promptly safety concerns or perceived problems. (RX 27) Mr. Shea took affirmative steps to give positive reinforcement to those who did so. (RX 26. See also TR 3832-3833)

84. It is not uncommon for Radiation Protection Technicians to raise safety concerns. In fact, the technicians are expected to raise concerns as part of their job responsibilities and are continuously reminded of that fact (TR 4088-4090, ll. 2-14, 8-25, 1-5; 6083, ll. 14-17; 3831-3833, ll. 6-25, 1-2, 19-25, 1-6; 5630, ll. 9-17; RX 28, P89-90)

85. Four other employees of the Radiation protection Department, Dahl, Pippen, Wall and Converse, had filed a Radiology Controls Problem Report (Report #3-92-00, RX 35), which related to this same HIC on which Complainant worked in August of 1992. Their report had been filed in April 1992, when the HIC work was at an earlier stage. There was no evidence that any of the four had been subjected to any adverse action as a result of raising concerns relating to the HIC, and I find this fact to be most probative herein. (TR 4097, ll. 19-21; 4098, ll. 8-20;-4099, ll. 10-19, 22-25; 4100, ll. 1-7, 18-25; 4101, ll. 1-5)

86. APS employee, Trajan Masler, submitted a CRDR raising concerns about the same HIC on which Complainant worked, again in the spring of 1992. (RX 35, 1258; TR 4101-4102, ll. 21-25, 1-9) Sneed, Wanslee, and Wagner were familiar with the CRDR filed by Masler. (TR 4102, ll. 13-23). Complainant offered no evidence that Masler had suffered any adverse action as a result of having raised a concern relating to the HIC, also a most probative factor herein. (TR 4102, ll. 7-12.)

87. It is not uncommon for PVNGS employees to file CRDRs. Almost 3,000 were filed in 1993 and approximately 2,600 were filed in 1994. (TR 5630, ll. 1-11)

88. Employees are often recognized for raising safety concerns. Co-workers Dan Cauley, Mike Baltz, Wayne Brewer openly raised safety suggestions or concerns at Safety Meetings. They were given recognition, so-called "atta-boys" for good jobs. (TR 4091, ll. 10-13; 4092-4093, ll. 6-25, 1-10, 19-21; 4105, ll. 12-17) None of them has been involuntarily terminated. (TR 4096, ll. 7-16; 4097, ll. 6-8) David McFelia received approximately $20 corporate dollars in recognition for a safety concern in which he actually stopped the job. (TR 386, ll. 22-25; 387-388, ll. 23-25, 1)

89. After the August 19, 1992 pre-job briefing, Complainant and two other Rad Techs were recognized for doing a good job in

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the CA yard. (TR 385-386, ll. 13-25, 1; RX 25)

90. The process and criteria used in Complainant's termination were the same as those used in the Pepple termination. (Ms. Shelton, TR 2655-59; MacFarland, TR 6242)

91. Complainant was treated the same as Larry Pepple was similarly, if not identically, situated. Mr. Pepple was with Complainant on the morning of February 10, 1994. Unlike Mr. Pepple, Complainant had driven the van while drinking beer. Pepple had driven the van while obviously impaired, but Complainant permitted him to do so and, in fact, handed him the keys. In any event, they had both violated the same company rules and policies, which misconduct warranted termination. (TR 2655-2659; 6242)

92. The same general process was applied when managers at Palo Verde received information that three other employees had

brought beer into a van. After the allegations were investigated, the appropriate manager decided that all three should be terminated. They were terminated in November 1994, based on violations of several of the same company policies and rules that provided the basis for Complainant's termination. Unlike Straub and Pepple, these employees were not found impaired or in a situation that tended to place the company in a bad light. (TR 6193-6194; 6228-6238; 6241-6242)

93. Prior to making the decision to terminate Complainant and Mr. Pepple, it was first determined that four other APS employees had previously been terminated for violating company policies/rules regarding alcohol in APS vehicles. As in Complainant's case, Marlene Shelton had recommended termination in two of the earlier situations that were reviewed. (TR 3200-3203)

94. Although Complainant attempted to identify numerous other similarly situated employees, he failed to produce evidence that any similarly situated employee bad been treated differently. (RX 52)

95. Complainant failed to produce any evidence to suggest that it was likely that he had been terminated because he engaged in protected activity. Because of that, and also because neither Mr. Shea, Ms. Shelton or Mr. MacFarland knew that he had engaged in any protected activity, Complainant has failed to establish a *prima facie* case that he was terminated for discriminatory reasons.

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96. The Respondent has produced substantial and probative evidence that Complainant was terminated based on legitimate business considerations; i.e., Straub's egregious misconduct on and improper use of the van.

97. Complainant failed to prove -- indeed he produced no evidence -- that the reasons set forth by the company for his termination were merely a pretext for discrimination.

LINARES' SELECTION FOR THE OUTAGE PLANNING POSITION

98. After Complainant expressed interest in transferring, his unit manager, Bill Sneed, suggested that he contact his supervisor about an opening in the Outage Planning Group. (RX 28, Straub depo. at 76-78)

99. Kent Linares was placed in the Outage Planning Group position after he was selected by John Gaffney, the Central ALARA Planning Supervisor. (RX 71)

100. Complainant failed to produce any evidence to support his allegation of retaliatory motive for the appointment of Mr. Linares to the Outage Planning job. He did not believe that Gaffney discriminated against him. On the contrary, he alleged --

based on hearsay only -- that his own supervisors had never submitted his name to Gaffney for consideration. (TR 4866; 4886)

101. Apparently not even Complainant believed that there was a causal connection between his own non-selection and protected activity, since he testified that he felt that Mr. Linares got the job because he was Wanslee's friend. (TR 4886, ll. 12-15) In any event, the underlying premise of Complainant's complaint on this point has no factual support. Mr. Wanslee testified that he had recommended Straub for the position and Gaffney confirmed that fact. (RX 71; TR 5877) Respondent exercised its discretion and selected the person it felt was best for that job, an appropriate management decision which should not be reversed by this Administrative Law Judge by means of a tortured analysis of the Act and pertinent precedents.

STRAUB'S ORAL REMINDER

102. On January 28, 1993, Training Supervisor Don Sobera wrote a memo to Complainant's supervisor describing Straub's inappropriate behavior during training. (RX 6)

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103. Shortly before he received Sobera's memo, Mr. Wanslee had received notice that a Unit 2 supervisor, Steve Sawchenko, had complained about Straub's having made inappropriate and racially offensive comments. After investigating that complaint, HR representative Kevin Salcido personally believed that termination was warranted. (TR 4369, ll. 6-9) However, HR recommended that Complainant should receive a written reminder. (TR 4368, ll. 22-23; 5040, ll. 16-20) As Straub's supervisor, however, Mr. Wanslee had the final decision as to what discipline he would receive. However, Mr. Wanslee disregarded HR's recommendation and did not give Complainant the written reminder for the racial incident. (TR 5077, ll. 7-10)

104. Rather, on February 8, 1993, Mr. Wanslee gave Straub, only an Oral Reminder for both incidents of inappropriate conduct that had been reported to him. (TR 4154, l. 14 -4156, l. 4; 5036, ll. 11-17)

105. There is no evidence to suggest, let alone prove, that the Oral Reminder was in retaliation for any protected activity. (TR 361-366; 5196-5199, TR 366, ll. 3-10)

FITNESS-FOR-DUTY

106. Prior to February 10, 1994, Complainant was randomly selected for Fitness-for-Duty testing, pursuant to and consistent with PVNGS Policies and Procedures. (TR 2949; 2950; CX 143) Complainant offered no evidence to support his claim (paragraph 22) that he had been excessively tested in retaliation for his having raised safety concerns. TR 4837, l. 1-4845, 1.7; 6194, l. 24-6195, l. 11)

107. In fact, Complainant was subjected to Random Fitness-for-Duty tests only twice between August 4, 1992, and February 15, 1994, when his employment was terminated. Employees are randomly selected for such testing by a computer program. (TR 4304-4305, ll. 16-25, 1-13; Exhibit CX 174) Thus, Complainant has failed to produce evidence that he was randomly tested more frequently than other employees or that he was ever tested in retaliation because he had raised any safety concern. (TR 4304, l. 16 - 4313, l. 7)

108. Mr. Straub and Mr. Pepple were told to report on the following day (February 11, 1994) and submit to a "for cause" Fitness-for-Duty test in order to determine whether their egregious conduct had resulted from the use of illegal drugs. (TR 1684, ll. 20-25; 1685, ll. 1-4)

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109. The security access, "ACAD" for both Staub and Pepple was revoked pending investigation of the facts. (TR 6192-6193; RX 14) Such revocation is standard operating procedure at PVNGS. (TR 6192-6193; 2445)

110. The "for cause" Fitness-for-Duty test to which Straub was subjected on February 11, 1994 was conducted pursuant to PVNGS' Policies and Procedures and was not retaliatory for activities protected under the Energy Reorganization Act (TR 1678-1679; 6194-6195; 6194, l. 24 - 6195, l. 11; 1678, l. 1 - 1682, l. 15; 2614, ll. 1-20) Furthermore, that Complainant would be off from work for the next few days after February 11, 1994 is no reason to deny the Respondent's right to test one of its employees in a sensitive employment, especially since illegal drug use was suspected to account for Complainant's behavior on February 10, 1994.

111. At the time he decided to have Complainant appear for Fitness-for-Duty testing on February 11, 1994, David Heler had no knowledge that Complainant had engaged in protected activity. (TR 4880, ll. 22-25, 1-3)

PAY ISSUE

112. Complainant's pay raises were not affected by any activities protected by the Energy Reorganization Act. (TR 6198-6202, RX 6254-6272, RX 65; RX 77.)

113. Complainant received a small pay increase in 1992. However, contrary to his testimony, the raise *preceded* the HIC job in August 1992. Moreover, it was consistent with standard personnel practices relating to changes in the evaluation periods and pay process. This was simply an interim raise designed to help employees whose raises were being deferred during the phase-in of the new system.

114. When Complainant got his annual increase in March 1993, it was more than three percent, which was consistent with, if not

better than, earlier raises he had received.

PERFORMANCE REVIEWS (TR 6201, ll. 7-19)

115. Complainant's performance reviews were not based on any activity protected by the Energy Reorganization Act. Complainant admitted that he received performance reviews from Mr. Wanslee which were better than some he had received from other

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supervisors in prior years. (TR 4871-4873, CX 27)

116. Complainant admitted that he understood that he was not being singled out or being treated differently when he had received his performance reviews late (TR 4130-4131)

117. Complainant received a performance review dated September 3, 1992, which described him as "a valuable job coverage technician." As did the supplemental review Mr. Wanslee prepared for Straub in March 1993, the September 1992 review, which Martha Wagner prepared, was highly complimentary of Complainant's technical skills. While it mentioned his negative attitude and suggested that it was affecting his work relationships with his peers and supervisory personnel, Complainant had received similar comments on his evaluations in earlier years. (RX 4; TR 4145-4146)

118. Complainant failed to produce evidence to suggest, let alone prove, that his performance reviews were retaliatory and based on any alleged protected activity.

119. Complainant was not taken off the "zip zone" project on February 8, 1993, as he alleged. On the contrary, he worked on that project until he left for an outage, an assignment which he had requested. When he returned from the outage, he again participated in the project. (TR 4166-4178)

120. Complainant was pulled off the HEPA project in November or December, 1992. This was approved by the Manager of RP Operations, John Albers, Complainant's personal friend. (TR 42784279) Mr. Albers agreed that Complainant's supervisors were acting well within their discretion. Moreover, Complainant was not even displeased with the decision. (TR 4281; 4283)

121. Complainant failed to produce any evidence that his work on special projects was in any way discriminatory or retaliatory because he had engaged in any protected activity.

BENEFITS

122. Respondent's handling of Complainant's benefits after termination, in particular the distribution of his 401(k) assets, was appropriate, pursuant to APS policies and procedures, and was in no way retaliatory for activities protected under the Energy Reorganization Act. (TR 5783-5810; RX 70)

123. Those employees responsible for handling Complainant's

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401(k) account had no knowledge that he had engaged in any protected activity and they did not treat him differently than any other employees in his situation. (TR 5810)

CLAIM OF MEDICAL PROBLEMS DUE TO WORK

124. Although Complainant alleged that he suffered medical problems due to his job-related stress related to the August 1992 HIC, his medical records belie that contention. They clearly reflect that Complainant sought help for his medical conditions prior to August 4, 1992. (CX 75) His problems were physiological in nature and related to his personal and family situation, and the records do not even mention any connection to job-related stress. (CX 75)

ALLEGATION REGARDING STRAUB'S LOCK

125. Complainant offered no evidence that the alleged cutting off of a lock from his locker on February 19, 1993 was in retaliation for raising safety concerns or engaging in other protected activity. In fact, Complainant thought that the lock had been removed because of his union activity. (TR 4314, ll. 2-4) In fact, Complainant did not believe that this incident had any relationship to safety concerns. (TR 4314, ll. 5-13)

HOSTILE WORKING ENVIRONMENT

126. Complainant failed to present evidence to suggest, let alone prove, that he was required to work in an environment which had the purpose or effect of unreasonably interfering with his work performance, i.e., a hostile or abusive work environment.

127. Moreover, Complainant failed to present probative and persuasive evidence that his work environment had been influenced in any way by any alleged protected activity.

128. Complainant, in his deposition testimony, admitted that he had virtually no problems with any supervisor throughout his employment at PVNGS. Even when he attempted to change this testimony at the hearing, he still admitted that in most years there, he had no problems with his supervisors. (TR 4107, ll. 14-24; 4108, l. 5; 4111, l. 15 - 4112, l. 9; 4115, l. 25-4116, l. 6; 4118, l. 4-4120, l. 25)

129. On fact, Complainant's supervisors and manager provided a positive working environment. For example:

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a. Each time Complainant asked to be assigned to work an outage, his Supervisors approved the request. (TR 4170, l. 22 - 4171, l. 17)

b. Complainant's supervisor, Dave Wanslee, rejected

the Human Resources Department recommendation for stronger discipline for Complainant's racial slurs and decided to impose lesser discipline, an Oral Reminder (TR 362, l. 10 - 363, l. 10)

c. The Supervision and the management of the Radiation Protection Department rewarded individuals for raising safety concerns. (TR 4105, ll. 6-17; 4106)

d. Complainant's supervisor praised him in a newsletter for "a job well done." (RX25)

130. While Complainant alleged that being assigned to "work control" was evidence of a hostile working environment, the evidence demonstrated, however, that employees in his job classification were rotated into the "work control" assignment both before and after he worked there. Complainant was not singled out; he was simply being asked to do his share of the work at PVNGS. (TR 4139, ll. 20-25; 4143, ll. 2-7; 5878, l. 25 - 5881, l. 8)

131. Complainant did not file a complaint until July 11, 1994.

CONCLUSIONS OF LAW

1. Complainant failed to prove that the decision to terminate his employment in February 1994 was in violation of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. § 5851, *et seq*.

2. Complainant failed to establish even a *prima facie* case that he was terminated because he had engaged in protected activity under the Energy Reorganization Act (ERA).

3. Even if Complainant's evidence could be viewed as having established a *prima facie* case, Respondent produced substantial evidence that the decision to terminate was based on legitimate, non-discriminatory employment considerations.

4. Complainant failed to prove that the reasons proffered to explain the termination decision were merely a pretext for discrimination or retaliation under the ERA.

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5. Complainant failed to prove that the manner in which his 401(k) benefits were handled following his termination was in way based on the fact that he had engaged in protected activity.

6. Complainant failed to produce *prima facie* evidence of discrimination with respect to any allegations relating to Respondent's Fitness-for-Duty program.

7. Even if Complainant had established a *prima*

facie case as to his Fitness-for-Duty allegations, Respondent produced evidence of valid reasons for the tests given to him under the Fitness-for-Duty program and he failed to prove that those reasons were a pretext for discrimination or retaliation under the Act.

8. The remainder of Complainant's claims asserted in his complaint are all time barred by the applicable statute of limitations. These claims involved isolated and discrete allegations of discrimination. Complainant's failure to file a timely complaint challenging with respect to these allegations cannot be excused under the "continuing violation" theory of discrimination law, since the elements required to establish a basis for that theory do not exist in this case.

9. In any event, Complainant failed to prove that any of the other employment actions challenged in his complaint occurred in retaliation for his having engaged in protected activity. In fact, Complainant failed to establish a *prima facie* case in support of any of these claims. Even if he did, Respondent has produced legitimate explanations for all of the challenged employment actions and Complainant failed to prove that any of them were, in fact, in retaliation for his having engaged in protected activity or, somehow, constituted dispute treatment. Specifically, Complainant failed to prove that any of the following were based on discriminatory, rather than legitimate, employment considerations: random testing under the Fitness-for-Duty program; giving him an oral reminder for inappropriate conduct in February 1993; selecting another employee, Kent Linares, for the Outage Planning Group assignment; Complainant's pay raise and performance review for 1992; and the alleged hostile environment claims related to Complainant's work control assignment in late 1992 and early 1993 and his work on special projects.

10. Complainant also failed to produce any credible, probative or persuasive evidence that his working environment was sufficiently offensive, abusive or intimidating to even arguably give rise to a hostile environment violation under the ERA.

Based on the foregoing, I find and conclude that Complainant failed to satisfy his burden of presenting a *prima facie* case. The overwhelming weight of the evidence proves that Respondent's sole motive for terminating Complainant was its conclusion that the misconduct on the van on February 10, 1994 constituted egregious behavior, violated company rules and procedures and warranted termination.

RECOMMENDED ORDER

On the basis of the foregoing, I recommend that the complaint filed by Joseph Roy B. Straub shall be, and the same hereby is DISMISSED.[4]

DAVID W. DI NARDI
Administrative Law Judge

[ENDNOTES]

[1] The following abbreviations shall be used herein: "ALJ" - Administrative Law Judge Exhibits, "CX" - Complainant Exhibits, "RX" - Respondent Exhibits, "TR" - Transcript.

[2] There is a dispute regarding whether or not purely internal complaints to management constitute protected activity, however, the Secretary of Labor has issued decisions which find that an employee is protected when engaging in this particular activity. See S. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK 37,43 (1990); compare *Kansas Gas & Elec. Co. V. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011(1986) (court upheld Secretary of Labor's position that employed protection provision of Energy Reorganization Act protects purely internal complaints) with *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984) (court held that quality control inspector's internal filing of intra corporate complaint was not protected activity).

[3] Respondents stipulated that Straub had participated in a protected activity while working at Palo Verde. (See Finding 71, p.21)

[4] The Final Order herein shall be issued by the Secretary of Labor.